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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 543

THE COMMONWEALTH OF PUERTO RICO, *Appellant*,

v.

THE RIDGE TOOL CO.,
THE RIDGE TOOL INTERNATIONAL CO., INC.,
and
ARTURO FORNARIS, JR., *Appellees*.

On Appeal From the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The Motion to Dismiss or Affirm submitted by the Appellees, The Ridge Tool Co. and The Ridge Tool International Co., Inc., has added nothing which alters the substantiality of the questions presented or

diminishes the need for action by this Court to reverse the judgment below. However, a few comments are in order regarding new points contained in the Motion which only obscure the central issues.

1. The Commerce Clause Is No Bar to Law 75

The Appellees mention allegedly formidable "burdens visited upon Commerce by Law 75."[1] The Commonwealth of Puerto Rico submits that no such burdens are created by Law 75, either through the erection of "[s]ubstantial entry barriers"[2] or otherwise, but there are other compelling reasons why this Court should disregard the Appellees' Commerce Clause argument.

First, the decision below does not rest on this ground, and it would be inappropriate for this Court to avoid review of an erroneous constitutional decision merely because it felt other constitutional grounds supported the result.

Second, certain questions regarding the precise applicability of the Commerce Clause to the Commonwealth of Puerto Rico remain unclear and need not—and therefore should not—be decided here. Prior to the federal legislation which led to the compact between the United States and Puerto Rico, the constitutional restrictions with respect to regulation of interstate commerce[3] were held not to apply to Puerto Rico in *Buscaglia* v. *Ballester*, 168 F. 2d 805 (1st Cir.

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[1] Appellees' Motion to Dismiss or Affirm, p. 19. Subsequent references to the Motion to Dismiss or Affirm will be designated "Motion, p. —."

[2] Motion, p. 19.

[3] Article I, Section 8, Clause 3.

1947); *cert. den.*, 332 U.S. 816 (1947). Puerto Rico is no longer a territory, having since required commonwealth status, but no case has invalidated the principle set forth in *Buscaglia*. Whatever the ultimate answer, it is fair to say that the question cannot be disposed of as simplistically as the Appellees attempt to do[4] and should not be in issue here.

2. Law 75 Does Not Conflict With Federal Antitrust Laws

This Court should also disregard Appellees' antitrust-Supremacy Clause argument because the decision below does not rest on this basis, but the argument falls of its own weight in any event. The Appellees, citing a number of cases, urge upon this Court the proposition that certain business practices, if permitted under the antitrust laws, cannot be restricted by legislation of the Commonwealth of Puerto Rico.

Any contention in this regard, as a challenge to "state" action, should fall by virtue of *Parker* v. *Brown*, 317 U.S. 341 (1943), but the Appellees present a case even more tenuous than this Court faced in *Parker*. They are not contending that "state" action has resulted in an alleged violation of the federal antitrust laws, but rather that any law which controls or restricts business conduct that has been held *permissible* under the federal antitrust law is necessarily in conflict with federal antitrust policy and must fall by virtue of the Supremacy Clause.

Appellees thus misrepresent the basic thrust of the federal antitrust laws which are designed to prohibit certain conduct which has been found—legislatively—to be contrary to public policy. However, conduct

[4] Motion, p. 19.

which is found—by the courts—to fall outside the Congressional prohibitions does not thereby attain some special status, immune from all non-federal interference. Such an argument completely ignores, or attempts to obscure, the basic difference between antitrust and other laws. It is interesting, however, to find that one of the cases cited by Appellees clearly recognizes the difference. *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md. 1956), has been cited for the proposition that "[t]he manufacturer may even grant exclusive dealerships, providing the dealer with an exclusive territory and agreeing not to compete itself or locate another distributor in the assigned area."[5] In *Schwing* the plaintiffs sued on the basis of an alleged violation of the antitrust laws. Although the complaints were dismissed as not stating a cause of action under the antitrust laws, Judge Thomsen said that the plaintiffs had "alleged facts which would support claims against Hudson for breach of contract." (at p. 902) The court thus recognized the basic distinction between antitrust and other laws and gave no indication—although the opportunity certainly presented itself—that any breach-of-contract action would be precluded because the acts alleged did not constitute a violation of, and were thus permissible under, the antitrust laws.

3. Abstention Remains Appropriate

The Appellees have quoted some language from *Harman* v. *Forssenius*, 380 U.S. 582 (1965), which, taken out of context, appears most persuasive.[6] An examination of that case, however, indicates quite clearly why

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[5] Motion, pp 20-21.

[6] Motion, p. 23.

abstention was improper. The issue was the validity of a Virginia voter requirement statute under the new Twenty-Fourth Amendment to the Constitution. In determining the abstention issue, this Court looked to the "nature of the constitutional deprivation" and "the probable consequences of abstaining," (at p. 537) finding that the right involved—the right to vote—was, quoting *Reynolds* v. *Sims*, 377 U.S. 533, the essence of a democratic society. (*Ibid.*) It was concluded that abstention was improper because the federal courts were "faced with a claimed impairment of the fundamental civil rights of a broad class of citizens." (*Ibid.*) In addition, immediate action was needed because of the impending cut-off date for meeting the residency requirement to vote in the upcoming election. In passing upon the validity of the statute, this Court also noted that it was clear and unambiguous in all material respects (at p. 535) and that Virginia had not pointed to any provision which could have been construed in any way to be constitutional.

Harman v. *Forssenius* is clearly distinguishable and not controlling because the right abridged by the legislation in question was of a preferred order, immediate action was obviously necessary, and—on the substantive issue—this Court was unable to conceive of any possible construction of the statute which would pass the test of constitutionality. In this case, on the other hand, the courts are faced with the claimed impairment of a right which certainly cannot be equated with the right to vote, and Appellees have made no convincing showing that expeditious federal determination of the Law 75 issues is required in the public interest. Furthermore, there are quite clearly a number of constructions of Law 75 which could eliminate any Federal Con-

stitutional questions, and, in disposing of the Motion to Dismiss or Affirm, this Court is not limited to consideration of the two possible constructions criticized by Appellees.[7]

Abstention is further supported in this case by the First Circuit's complete disregard, and perhaps ignorance, of civil law concepts and their relationship to Law 75. The assumptions made by the court as to the operation and effect of Law 75 clearly indicate this lack of sensitivity and awareness.[8] This reply is not the place to detail all of the specific civil law concepts which relate to distributorship contracts and to Law 75, but a few—by way of example only—are good faith,[9] abuse of right[10] and mitigation of damages.[11] In view of these and many other doctrines which might affect the ultimate operation of Law 75, the Supreme Court of Puerto Rico should be given an opportunity to con-

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[7] Motion, pp 23-24.

[8] Jurisdictional Statement, Appendix A, pp 1a-11a.

[9] Article 88 of the Puerto Rico Commercial Code, 10 L.P.R. Annot. § 1308, provides that commercial contracts shall be executed and complied with in good faith and Article 1207 of the Puerto Rico Civil Code, 31 L.P.R. Annot. § 3372 voids obligations contrary to law. See also, Powell, R., "Good Faith in Contracts," 1956 Current Legal Problems 16; Rosenberg, G.A., "The Notion of Good Faith in the Civil Law of Quebec," 7 McGill L.J. 2 (1960).

[10] The doctrine of abuse of right is not generally known in common law but is a well accepted concept of civil law. It recognizes that there is a definite need to resolve the conflicts which arise when someone is aggrieved by another who has acted in the exercise of a purported legal right. See, Bruteau, P., II *Civil Law Fundamental Principles* 674; Angus, D., "Abuse of Rights in Contractual matters in the Province of Quebec," 8 McGill L.J. 150 (1961).

[11] Article 1056 of the Civil Code of Puerto Rico, 1 L.P.R. Annot. § 3020.

strue Law 75 in the first instance. Then perhaps—but certainly not before—the federal courts might have the background and foundation necessary for an informed judgment as to Law 75's validity under the United States Constitution.

The citation of *McGregor-Doniger, Inc.* v. *Tribunal Superior de Puerto Rico*[12] is meaningless. The precise question before the Supreme Court of Puerto Rico was whether the case was to proceed to arbitration and whether lower court proceedings should, therefore, be stayed in the interim. The fact that the court did not render an advisory opinion favorable to Appellees' position cannot be material here.

WHEREFORE, the Commonwealth of Puerto Rico requests that this Court deny Appellees' Motion and proceed with whatever steps are deemed necessary to reverse the judgment below.

Respectfully submitted,

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[12] Motion, p. 24 and Appendix pp 1a-7a.